

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF TRANSPORTATION

In the Matter of the Denial of Eller
Media Company's Applications
for Outdoor Advertising Device
Permits in the City of Mounds
View, Minnesota.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above-captioned matter came on for hearing before Administrative Law Judge George A. Beck commencing at 9:00 a.m. on December 8, 2000. The record closed on January 30, 2001 when the final written memorandum was received.

David L. Phillips, Assistant Attorney General, Office of the Attorney General, 525 Park Street, Suite 200, St. Paul, MN 55103-2106, appeared on behalf of the Minnesota Department of Transportation ("Department").

Marvin A. Liszt, Attorney, Bernick & Lifson, P.A., 5500 Wayzata Boulevard, Suite 1200, Minneapolis, MN 55416, appeared on behalf of Eller Media Company ("Eller Media" or "Eller").

Karen R. Cole, Attorney, and Bob Vose, Attorney, Kennedy & Graven, 470 Pillsbury Center, 200 South Sixth Street, Minneapolis, MN 55402, appeared on behalf of the City of Mounds View ("City").

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Transportation will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Elwyn Tinklenberg, Commissioner, Minnesota Department of Transportation, 395 John Ireland Boulevard, M.S. 100, St. Paul, MN 55155; telephone 651.297.2930, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Whether the application of Eller Media Company for outdoor advertising device permits for locations along State Highway 10 and Interstate Highway 35W in the City of Mounds View should be granted under Minn. Stat. § 173.13.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On or about May 8, 2000, Eller Media submitted applications to the Department for the erection of six billboards along State Highway 118/10 near its intersection with Interstate 35W. The billboards are proposed to be located along the Bridges Golf Course property on land owned by the City of Mounds View, Minnesota.^[1]

2. The locations of the six billboards are as follows:

- A. **Billboard #1** - located on the west side of Interstate 35W South at the intersection of 35W South and State Highway 118/10.^[2]
- B. **Billboard #2** – located 1000 feet west of Billboard #1 on the north side of State Highway 118/10.^[3]
- C. **Billboard #3** – located 1000 feet west of Billboard #2 on the north side of State Highway 118/10.^[4]
- D. **Billboard #4** - located 1000 feet west of Billboard #3 on the north side of State Highway 118/10.^[5]
- E. **Billboard #5** - located 1000 feet west of Billboard #4 on the north side of State Highway 118/10.^[6]
- F. **Billboard #6** - located 1000 feet west of Billboard #5 on the north side of State Highway 118/10. This location is currently undeveloped land known as the Outlot Sysco Addition and is on the site of a proposed expansion of Bridges Golf Course.^[7]

3. The City of Mounds View's Comprehensive Plan, adopted in 1982, designated the Bridges Golf Course property as "Industrial."^[8]

4. On May 29, 1984, the Mounds View City Council adopted Ordinance No. 358 that rezoned multiple City-owned properties to "Public Facilities." In addition, at that time, unplatted lands north and south of Highway 10 were rezoned as a Conservancy, Recreation and Preservation ("CRP") District. (Judicial Notice of Ordinance No. 358).^[9]

5. On August 17, 1988, the State of Minnesota, by quitclaim deed, conveyed to the City of Mounds View the South half of the Northeast quarter of Section 5, upon which three of the billboards are proposed to be placed.^[10]

6. The Bridges Golf Course was opened by the City in June 1995.^[11]

7. On January 14, 2000, Eller Media submitted a proposal to the City of Mounds View to erect six billboards along State Highway 118/10 and Interstate 35W. Eller proposes to build billboards with a rock face and a tower.^[12]

8. Eller Media's proposal guaranteed to the City an annual base rent of \$36,000 per structure. If six structures were installed, the City was guaranteed \$216,000 the first year. The total guaranteed base rental payment over the 15-year lease totaled \$4,325,124. In addition, Eller's proposal estimated the value of the outdoor advertising to be \$540,000 over the course of a 15-year lease.^[13]

9. On March 27, 2000, the Mounds View City Council adopted Ordinance 644 that amended the City Code to conditionally allow billboards as an interim use on properties north of State Highway 10.^[14]

10. On March 27, 2000, the Mounds View City Council also adopted Ordinance No. 655 that rezoned parcels associated with the Bridges Golf Course from "CRP" and "Industrial" to "Public Facilities".^[15]

11. On March 27, 2000, the Mounds View City Council also approved an Interim Use Permit for the six proposed billboards on the Bridges Golf Course property.^[16]

12. On March 27, 2000, the Mounds View City Council also approved a motion to authorize the Mayor and Acting City Administrator to execute the lease agreement with Eller Media.^[17]

13. At the time Eller Media applied for the Outdoor Advertising Device Permits, all proposed billboard sites were located on property owned by the City and zoned as "Public Facilities."^[18]

14. The City of Mounds View has zoned the majority of its City-owned property as "Public Facilities." Permitted uses in the PF district are public buildings, public parks, playgrounds, athletic fields, parking areas, golf courses, public sewers, water lines, water storage areas, public streets, easements, other public ways, highways and thoroughfares, treatment and pumping facilities and other public utility and public service facilities.^[19] In addition to Bridges Golf Course, the city hall complex, community center, water tower and water treatment facilities are operated within areas zoned "Public Facilities."^[20]

15. On or about June 22, 2000, Gary Erickson, Special Programs Manager of the Department of Transportation conducted a zone review of areas designated as "Public Facilities Districts" in the City of Mounds View.^[21] The following areas and

structures were observed by Mr. Erickson: City Hall complex including water works, road maintenance facility, ball fields, volley ball area, picnic tables, and a playground; Lambert Park; Random Park; a fenced in brick building believed to be a water pumping station; Woodcrest Park; Silver View Park; Ramsey County Library; Silver View Park; another fenced in brick building believed to be a water pumping station; part of Lakeside Park; Groveland Park; Ardan Park; Hillview Park; another fenced in brick building believed to be a water pumping station; Greenfield Park; Oakwood Park; a play ground; a structure believed to be an emergency siren; and a community center.^[22]

16. Pursuant to the City's Municipal Code, golf courses are permitted uses in areas zoned "Public Facilities." Additional permitted uses in a Public Facilities District are public buildings and uses, public parks, playgrounds, athletic fields, parking areas, public sewers, water lines, water storage areas, public streets, easements and other public ways, highways, thoroughfares, treatment and pumping facilities and other public utility and public service facilities.^[23] Privately owned commercial recreational uses are permitted in areas zoned as "B- 3, Highway Business District" and "B-4, Regional Business District."^[24] A privately owned golf course would be allowed in a B-3 or B-4 district.^[25]

17. Bridges Golf Course is a municipally owned golf course. The site hosts a 9-hole golf course, a driving range, a pro shop, snack bar and offers private golf lessons. It has three PGA pros on staff.^[26] The driving range has 25,000 to 30,000 customers each year and the golf course handles about 45,000 rounds per year.^[27] The golf course generates an annual revenue of approximately \$800,000 and net income of \$200,000 per year.^[28] However, the net income does not cover the payment on the bonded indebtedness for the golf course, which was \$214,000 in 2000 and escalates to \$400,000 by 2013.^[29]

18. In addition to the golf course and driving range, the golf course property holds a parking lot, a metal quansit hut for storage, a rain shelter, a pump house that houses the irrigation system and a clubhouse.^[30] The driving range is surrounded by a five to six-foot highway metal fence and has 25-foot high nets that go down the first 100 feet of the driving range.^[31] Nighttime use of the driving range is made possible with a series of five light stations creating lighting similar to that of an outdoor football or baseball stadium.^[32]

19. The golf course surface is comprised of "high maintenance turf" requiring constant watering with the use of an irrigation system.^[33] The irrigation system is cut into the subsoil and is comprised of approximately 20 miles of pipe with irrigation heads at 70 to 75 foot intervals.^[34] The course utilizes three drainage systems including drain tile under the bunkers, greens and tees.^[35] The course also has artificial ponds.^[36]

20. The golf course was set up by the City as an enterprise fund with its revenues kept separate from the general revenues of the City.^[37] Residents of Mounds View do not receive a discount when using the golf course.^[38] Several of the golf course employees are compensated on an incentive pay basis linked to the profitability

of the facility.^[39] The golf course spends approximately \$10,000 per year on advertising.^[40] It has a liquor license.^[41]

21. The Department has granted permits for the construction of billboards at the Lost Spur Golf Course in Eagan.^[42] That golf course is privately owned by a non-profit company.^[43] It has a leased restaurant banquet facility open to the public.^[44] The Lost Spur facility is located on land zoned PF or public facilities by the city of Eagan. The Eagan PF district allows the following uses: public structures, parks, playgrounds, camping grounds, swimming pools, tennis courts, golf courses, churches, schools, hospitals and certain mounted antennae.^[45]

22. By letter dated June 9, 2000, the Department denied Eller's applications for the Outdoor Advertising Device Permits for the six billboards.^[46] The Department asserted that the permits were denied because it did not believe that the property on which the billboards were proposed to be located is within a "business area" as required by Minnesota Statutes.^[47]

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Transportation have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50 and 173.13.

2. Proper notice of the hearing was timely given and all relevant substantive and procedural requirements of law and rule have been fulfilled.

3. Any of the foregoing Findings properly considered Conclusions of Law are hereby adopted as such.

4. Pursuant to Minn. Rule 1400.7300, subp. 5, the applicant, Eller Media, has the burden of establishing that its permit application should be approved.

5. Minn. Stat. § 173.13 subd. 1 provides that:

No advertising device shall be erected or maintained in any adjacent area without a permit therefor being first obtained from the commissioner, except that permit systems of legitimate local zoning authorities shall take precedence inside a business area.

6. Minn. Stat. § 173.08 subd. 8 allows the construction of:

advertising devices which are located, or which are to be located, in business areas and which comply, or will comply when erected, with the provisions of sections 173.01 to 173.27;

7. Minn. Stat. §§ 173.16 Subd. 5 (3) states:

The commissioner may not disapprove any zoning ordinance adopted by a county or local zoning authority that has the effect of establishing a business area unless the zoning ordinance would result in the loss to the state of federal highway funds.

8. A business area is defined by Minn. Stat. § 173.02, subd. 9 as follows:

“Business area” means any part of an adjacent area which is (a) zoned for business, industrial or commercial activities under the authority of any law of this state or any political subdivision thereof; or (b) not so zoned, but which constitutes an unzoned commercial or industrial area as herein defined.

9. The City of Mounds View PF zoning district is an area zoned for business, industrial or commercial activities.

10. 23 CFR § 750.703 (a) provides:

Commercial and industrial zones are those districts established by the zoning authorities as being most appropriate for commerce, industry, or trade, regardless of how labeled. They are commonly categorized as commercial, industrial, business, manufacturing highway service or highway business (when these latter are intended for highway-oriented business), retail, trade, warehouse, and similar classifications.

11. 23 CFR § 750.08 provides in part:

(b) State and local zoning actions must be taken pursuant to the state’s zoning enabling statute or constitutional authority and in accordance therewith. Action which is not a part of a comprehensive zoning and is created primarily to permit outdoor advertising structures is not recognized as zoning for outdoor advertising control purposes....

(d) A zone in which limited commercial or industrial activities are permitted as incident to other primary land uses is not considered to be a commercial or industrial zone for outdoor advertising control purposes.

12. The commercial and industrial activities permitted in the PF zone established by the City are not incidental to other uses.

13. The applicant’s motion to reconsider the denial of its motion for summary approval of the permits is denied.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner of Transportation grant Eller Media's application for outdoor advertising device permits.

Dated this 28th day of February, 2001.

S/ George A. Beck

GEORGE A. BECK

Administrative Law Judge

Reported: Transcript Prepared.

Kirby A. Kennedy & Associates

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

The material facts of this matter are not in dispute. The issue in this matter is whether Eller Media Company has demonstrated that its applications for the erection of six advertising devices along State Highway 10 near Interstate Highway 35W in the City of Mounds View should be approved by the Minnesota Department of Transportation under applicable law.

The legislature adopted the Minnesota Outdoor Advertising Control Act of 1971^[48] in order to comply with Title I of the Federal Highway Beautification Act of 1965 and to maintain eligibility for federal highway funding. The Commissioner of Transportation is charged with administering the Minnesota Outdoor Advertising Control Act, which includes considering applications for the erection of billboards along interstate and primary highways.

Minnesota law permits advertising devices on highways in a "business area."^[49] A business area is defined as an area:

zoned for business, industrial or commercial activities under the authority of any law of this state or any political subdivision thereof.^[50]

Minnesota law also requires that "the commissioner of transportation...comply with federal law and federal rules and regulations relating to billboard control on the interstate and primary systems..."^[51] Applicable federal regulations provide in part that:

Commercial and industrial zones are those districts established by the zoning authorities as being most appropriate for commerce, industry, or trade, regardless of how labeled.^[52]

Federal regulations, however, also provide that:

A zone in which limited commercial or industrial activities are permitted as incident to other primary land uses is not considered to be a commercial or industrial zone for outdoor advertising control purposes.^[53]

The Department of Transportation, in denying Eller's applications, contends that the municipal golf course is not a "business area" as contemplated by state and federal law. The Department contends that the PF zoning district is intended for governmental uses, not commercial uses. The Department further argues that the golf course's prior zoning designation as a Conservancy, Recreation and Preservation ("CRP") District was not an issue for the City until the possibility of billboards arose. The Department contends that the rezoning action taken by the City in March 2000 was done only to make it possible to place billboards in the area. As a result, the Department asserts that it cannot recognize this rezoning based on 23 C.F.R. § 750.708(b) which states, in pertinent part:

State and local zoning actions must be taken pursuant to the state's zoning enabling statute or constitutional authority and in accordance therewith. Action which is not a part of a comprehensive zoning and is created primarily to permit outdoor advertising structures is not recognized as zoning for outdoor advertising control purposes.

An examination of the nature of the golf course is helpful in determining whether it constitutes a commercial enterprise as opposed to serving a purely recreational or governmental purpose. The testimony ranged from the physical layout and make-up of the golf course to the activities conducted on the property. The record establishes that the development of the golf course involved significant artificial measures including sophisticated irrigation techniques, removal of natural grasses, and the placement of artificial lighting. Such measures are inconsistent with the purpose of a CRP district as described by Chapter 1117 of the Mounds View City Code, in part, as follows:

Such recreational use development shall be designed to conserve, preserve and enhance the environment, important natural features and resources, forests and woodlands and control density, particularly in areas of the City affected by major highways, airports, and other regional areas.

The activities on the golf course and the manner in which those activities are conducted further support the commercial nature of the enterprise as opposed to that of a preserved recreational facility. The golf course expends significant dollars in marketing and advertising. The day to day operations are run in a manner consistent with a private commercial golf course, and include the payment of certain salaries on an incentive basis tied to profit. The record does not contain any evidence of a significant

distinction between Bridges Golf Course and any privately-owned golf course, (which would be allowed in the City's Highway and Regional Business Districts), other than the distinction of ownership. But neither state nor federal statutes make ownership a relevant factor for purposes of considering an application for an outdoor advertising device permit.

Likewise, it is clear that the label of a zone (in this case public facilities) also is not a determinative factor. Rather, the proper focus rests with the activities conducted on the land and the nature of its use. Governmental ownership does not exclude commercial use. This is apparent in numerous municipalities where liquor stores, water parks, community centers and other commercial enterprises are conducted. The Department's argument is weakened by a lack of consistency in its granting of a permit for the erection of billboards on a golf course zoned PF in the city of Eagan. It apparently concluded that a private non-profit golf course in Eagan's PF district was within a business area.^[54] Here, the record supports the conclusion that this golf course property also constitutes a "business area".

The Department argues that even if the activities conducted on the golf course are commercial in nature, this activity is merely incidental to its primary use and therefore should not be considered a commercial or industrial zone for outdoor advertising purposes pursuant to 23 CFR § 750.708(d) (2000). The Department supports this contention by citing United Outdoor Advertising v. Business, Transportation and Housing Agency.^[55] In that case the California Supreme Court found that state and federal law precluded the placement of billboards on vacant parcels of land where commercial activities were only allowed on a site-by-site basis pursuant to a conditional use permit. The California Court further held that because commercial and industrial uses require prior approval by the county while certain residential and agricultural uses existed as a matter of right, that this was evidence that the residential and agricultural uses were primary, and the other uses were not.

The record in this matter establishes that the City's PF zoning district allows for a variety of uses including the business activities involved in the operation of the City office complex, the community center and the golf course as well as the industrial activities of the water treatment plant and the water tower. These uses are not merely incidental. They are expressly permitted in the PF zone and are not subject to a site-by-site approval as was the case with the commercial and industrial uses in the "Desert Living" zone considered by the California Court. The Mounds View PF zoning district designates governmental ownership and allows, as a primary use, a variety of activities including commercial uses. Additionally, it is clear that the billboard location itself is a commercial use.

Eller and the City question the propriety of addressing the Department's contention that it cannot recognize a zoning action "which is not part of a comprehensive zoning and is created primarily to permit outdoor advertising structures..."^[56] The City and Eller's contend that this issue was raised for the first time in the Department's post-hearing memorandum. However, the issue of "spot-zoning" for purposes of allowing the erection of the billboards was addressed at hearing. Both

parties were afforded the opportunity to present testimony and evidence on this subject and both the City and Eller did elicit relevant testimony supporting their contention that the rezoning was a part of the City's comprehensive zoning plan. Both parties had the opportunity to address the federal regulation by memorandum after the hearing. As a result, the Administrative Law Judge finds that it is appropriate to address the issue of whether the parcel in question was improperly rezoned by the City.

In addressing this issue, Eller and the City contend that the Department need not, and should not probe into the motives behind the City's zoning determinations to determine if the City has violated the federal provision in light of unambiguous state statutes. Eller and the City point to Penn Advertising, Inc. v. Department of Transportation,^[57] in which the Pennsylvania court determined that it was improper for the Pennsylvania Department of Transportation to look beyond its own statutes to the federal statutory scheme to interpret the requirements of an unambiguous state statute. This decision reversed a prior order to deny a permit application even though the record had established that the only reason the owner of the tract sought to rezone the property was to obtain a permit for a billboard. This Pennsylvania decision is difficult to reconcile with the requirements of Minn. Stat. § 173.185 that provides that the Department "shall comply with federal law and federal rules and regulations relating to billboard control on the interstate and primary systems..." As a result, the Administrative Law Judge finds that not only is the issue of the City's rezoning appropriate to address, but also that the Department correctly looked to the federal provisions to determine if the permits should be denied based on improper "spot zoning." It is important to keep in mind, however, that Minnesota Statutes and federal regulations also encourage the commissioner to respect local zoning decisions.

In making a determination of the reasonableness of a rezoning and whether it constitutes illegal spot zoning, an important factor is whether the rezoning is consistent with the comprehensive land use or zoning plan.^[58] Here, the facts demonstrate that the city has rezoned its city-owned property as PF as far back as 1984. Further, City Council minutes support the contention that the failure to convert the golf course property from its prior designation of CRP was an oversight that was discovered when reviewing Eller's application for an interim use permit for the billboards.^[59] The minutes reflect that this was a change that some thought had taken place a number of years ago.^[60] The City Community Development Director specifically denied that the golf course property was rezoned in order to allow billboards on the property.^[61] Furthermore, the CRP designation provided for no permitted uses, which would preclude the existence of the golf course on the property. The Administrative Law judge finds that the evidence supports the conclusion that the rezoning was consistent with the City's comprehensive zoning plan and not an inappropriate effort to allow the erection of billboards.

The record supports a conclusion that the City of Mounds View's PF District is comprised of areas that are "zoned for business, industrial or commercial activities" and that such activities are occurring as the primary use on many of the parcels so designated. Furthermore, the record does not support the Department's contention that

the golf course property was improperly rezoned for the purpose of erecting billboards. As a result, Eller has demonstrated that its applications should be granted.

G.A.B.

^[1] Eller Exs. 1-6.

^[2] City Ex.12.

^[3] Id.

^[4] Id.

^[5] Id.

^[6] Id.

^[7] City Ex. 12; T. 61.

^[8] Exhibit D of State's Motion in Opposition To Petitioners' Joint Motion for Summary Approval.

^[9] The CRP district was designated for major recreational use facilities. (City Exhibit 16).

^[10] DOT Ex. J.

^[11] DOT Ex. G.

^[12] Eller Ex. 11.

^[13] Eller Ex. 11.

^[14] DOT Ex. I.

^[15] DOT Ex. H.

^[16] Id.

^[17] Id.

^[18] Eller Exs. 1-6; T. 63.

^[19] DOT Ex. A.

^[20] T. 69-70.

^[21] T. 165.

^[22] DOT Ex. D.

^[23] DOT Ex. A.

^[24] City Exs. 14-15; T. 70.

^[25] City Exs. 13-15; T. 73, 77.

^[26] City Ex. 20, 24; T. 142.

^[27] T. 138-139.

^[28] T. 145, 148.

^[29] DOT Ex. G.

^[30] T. 111-116; City Exs. 19-21.

^[31] T. 112-113.

^[32] T. 113.

^[33] T. 115.

^[34] T. 121, 124.

^[35] T. 122.

^[36] T. 123.

^[37] T. 148-149.

^[38] T. 142.

^[39] T. 149.

^[40] T. 145; City Ex. 25.

^[41] T. 155.

^[42] T. 152-153.

^[43] T. 50; Eller Exs. 8-9.

^[44] T. 41.

- [\[45\]](#) Eller Ex. 10.
- [\[46\]](#) Eller Ex. 7.
- [\[47\]](#) T. 20-21.
- [\[48\]](#) Codified at Minnesota Statutes, chapter 173
- [\[49\]](#) Minn. Stat. § 173.08, Subd. 1(h).
- [\[50\]](#) Minn. Stat. § 173.08, Subd. 9.
- [\[51\]](#) Minn. Stat. § 173.185.
- [\[52\]](#) 23 C.F.R. § 750.703(a).
- [\[53\]](#) 23 C.F.R. § 750.708(d).
- [\[54\]](#) Finding of Fact No. 21.
- [\[55\]](#) 242 Cal. Rptr. 738 (1998), 746 P.2d 877 (Cal. 1998).
- [\[56\]](#) 23 C.F.R. § 750.08(b).
- [\[57\]](#) 608 A.2d 115 (1992).
- [\[58\]](#) See, 3 Ziegler, Rathkopf's The Law of Zoning and Planning, p. 28-5, 4th ed. (1995).
- [\[59\]](#) Mounds View City Council Minutes, March 27, 2000
- [\[60\]](#) Id.
- [\[61\]](#) Testimony of James Erickson at 101-2.